(1)

91-1161

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STANLEY CARTER KISER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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(1a) QUESTIONS PRESENTED

1. Where police seize a person and his luggage in violation of the Fourth Amendment, and, as a direct result of that seizure, obtain affirmative (dog-sniff) evidence that the luggage contains contraband, and then submit such evidence to a magistrate who issues a warrant to search the luggage, are fruits of the ultimate search of the luggage by these same officers, pursuant to the warrant thus obtained, subject to the exclusionary rule?

2. Does the position of the Eighth Circuit in the instant Opinion, following United States v. White, 890 F.2d 1413 (8 Cir. 1989)--that the exclusionary rule does not apply in this situation--conflict with this Court's holding in

Murray v. United States, 487 U.S. 533, 101 L.Ed.2d 472 (1988), and with the Tenth Circuit's application of United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677 (1984), in United States v. Scales, 903 F.2d 765 (10 Cir. 1990)?

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Stanley Carter Kiser, was the defendant in the United States District Court for the Southern District of Iowa, and appellant in the United States Court of Appeals for the Eighth Circuit.

Respondent, United States of America, was the plaintiff in the District Court, and appellee in the Court of Appeals.

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1. The exclusionary rule applies when police officers, who have conducted a seizure of defendant and his luggage in violation of the Fourth Amendment, obtain evidence as a result of that unlawful seizure, and take evidence thereby obtained to a magistrate, who issues a warrant, based upon such tainted evidence, for

the further search of the same luggage by those same officers. In such a situation, exclusion from court of the evidence obtained via such tainted warrant would have a deterrent effect in discouraging illegal police activity, whereas failure to apply the exclusionary rule would encourage official violation of the Fourth Amendment if the fruits of such illegal activity could be used to obtain a warrant which in effect could exonerate the prior illegality.

Certiorari should be allowed for a number of reasons, including:

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A. To resolve the conflict as to applicability of the exclusionary rule in such a situation. The position of the Eighth Circuit that it does not apply, as per the instant Opinion, following United States v. White, 890 F.2d 1413 (8 Cir. 1989), directly conflicts with this Court's holding in Murray v. United States, 487 U.S. 533, 101 L.Ed.2d 472 (1988), and with the Tenth Circuit's application of United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677 (1984), in United States v. Scales, 903 F.2d 765 (10 Cir. 1990).

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(1d) Judgment Below

The Opinion of the Court of Appeals for the Eighth Circuit, No. 90-2189, filed October 16, 1991, affirming defendant's judgment of conviction and sentence, is attached as App. A to this Petition. It is reported at 948 F.2d 418 (8 Cir. 1991).

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No.

STANLEY CARTER KISER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Stanley Carter Kiser (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit, affirming the judgment (conviction and sentence) of

the United States District Court for the Southern District of Iowa.

Defendant was convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. Sec. 848(b) (1988); conspiring to knowingly and intentionally distribute cocaine in violation of 21 U.S.C. Secs. 841(a)(1) and 846 (1988); and nine counts of knowingly and intentionally possessing various amounts of cocaine with the intent to distribute them between July 4, 1982, and January 17, 1984, in violation of 21 U.S.C. Secs. 841(a)(1) and 841(b)(1)(B) (1988).

Judgment, Opinion and Orders Below

The Opinion of the Court of Appeals for the Eighth Circuit, affirming the District Court's judgment, is set out as App. A.

(1e) Jurisdictional Statement

On October 16, 1991, the Court of Appeals filed its Opinion affirming the judgment of the District Court. (App. A)

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. Sec. 1257(a) and Rules 10.1, 12.1 and 13.1 of this Court.

Constitutional Provision

AMENDMENT IV--SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

At trial, the evidence consisted primarily of testimony of co-defendants, who plea-bargained for reduced sentences and testified against defendant, and evidence that on May 6, 1980 in Chicago O'Hare Airport, cocaine was seized from defendant. Even though in State proceedings that evidence had been suppressed, People v. Kiser, 113 Ill.App.3d 501, 447 N.E.2d 858 (1 Dist. 1983), the government asserted it would move its introduction in the federal prosecution. The District Court held that the seizure and detention of defendant and his suitcase was in violation of the Fourth Amendment (R. 204); however, because after the officers seized the suitcase, they obtained a positive sniff by a trained dog and they

incorporated that fact into an application for a search warrant (R. 204-05), which was granted, and ultimately searched the suitcase pursuant to that warrant, under the mandate of United States v. White, 890 F.2d 1413 (8 Cir. 1989), the ultimate opening of the suitcase did not require application of the exclusionary rule under the concept of good faith reliance. Expressing the same position as in White, supra, the Eighth Circuit affirmed. (App. A)

REASONS FOR GRANTING CERTIORARI

1.

The exclusionary rule applies when police officers, who have conducted a seizure of defendant and his luggage in violation of the Fourth Amendment, obtain evidence as a result of that unlawful seizure, and take evidence thereby obtained to a magistrate, who issues a warrant, based upon such tainted evidence, for the further search of the same luggage by those same officers. In such a situation, exclusion from court of the evidence obtained via such tainted warrant would have a deterrent effect in discouraging illegal police activity, whereas failure to apply the exclusionary rule would encourage official violation of the Fourth Amendment if the fruits of such illegal activity could be used to obtain a warrant which in effect could exonerate the prior illegality.

Certiorari should be allowed for a number of reasons, including:

A. To resolve the conflict as to applicability of the exclusionary rule in such a situation. The position of the Eighth Circuit that it does not apply, as per the instant Opinion, following United States v. White, 890 F.2d 1413 (8 Cir. 1989), directly conflicts with this Court's holding in Murray v. United States, 487 U.S. 533, 101 L.Ed.2d 472 (1988), and with the Tenth Circuit's application of United

States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677 (1984), in United States v. Scales, 903 F.2d 765 (10 Cir. 1990).

B. To prevent implicit judicial eradication of the Fourth Amendment and the exclusionary rule.

The Eighth Circuit Court of Appeals held that where police seize a person and his luggage in violation of the Fourth Amendment, and, as a direct result of that seizure, obtain affirmative (dog-sniff) evidence that the suitcase contains contraband, and then submit such evidence to a magistrate and thereby obtain a warrant to search the suitcase, the ultimate search by these same officers pursuant to the warrant does not require application of the exclusionary rule, because they searched the suitcase in good faith pursuant to a warrant. (App. 10-12) This decision directly conflicts with this Court's holding in

Murray v. United States, 487 U.S. 533, 101 L.Ed.2d 472 (1988), and with the Tenth Circuit's application of United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677 (1984), to this type of situation. United States v. Scales, 903 F.2d 765 (10 Cir. 1990). In Murray, this Court held that where evidence obtained via unlawful search or seizure prompted agent's decision to obtain a warrant, or where the tainted evidence is presented to a magistrate in support of an application for a warrant, and affected his decision to issue the warrant, then the search or seizure conducted pursuant to the authorization of that warrant is unconstitutional and the exclusionary rule is applicable. Implicit in this Court's holding in Murray is that Leon cannot prevent application of the

exclusionary rule where the warrant is based on evidence obtained by officers in violation of the Fourth Amendment.

Here, subsequent to a seizure of the defendant and his luggage at O'Hare Airport, which the federal trial court judge held was in violation of the defendant's Fourth Amendment rights, (R. 204-05),[1] [2] the agents subjected the bag to be sniffed by a dog, whose response affirmed that there was contraband in the bag. The agents then applied to the

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1. The District Court stated:

> "I concluded that the detention of him and detention of his bag was in violation of the Fourth Amendment to the United States Constitution." (R. 204)

2. The Illinois courts already had held such seizure was unconstitutional. People v. Kiser, 113 Ill.App.3d 501, 447 N.E.2d 858 (1 Dist. 1983).

magistrate for a warrant, presenting an application for warrant containing their information concerning defendant getting off the airplane, (see underlying facts as related in People v. Kiser, supra), and that the bag, according to a trained narcotics detection dog, contained contraband.[3] Here, both the District

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3. The warrant in this regard reads:

> "Subsequently, Officer Kinsella contacted United States Customs Dog Handler, Don Coulliard, and requested his assistance and the use of his dog "Silver" in sniffing out suspected narcotics in the seized piece of luggage. The seized luggage was placed with several other pieces of baggage and Officer Kinsella observed "Silver" become active around Kiser's leather Saranic travel bag and Kiser's gray leather brief case and attempted to bite same. Dog Handler Don Coulliard advised Officer Kinsella that the dog's reaction was a positive one to the presence of drugs/and/or narcotics."

Court and the Court of Appeals found that the tainted evidence--the result of the dog sniff--both affected the agents' decision to seek a warrant and affected the magistrate's decision to issue the warrant.

The District Court, in rendering its opinion, stated:

> "They got a dog to sniff, of course, and that was the clinching information that was used to get the warrant." (R. 204-05)

The Court of Appeals, in discussing the facts, stated:

> "The officers then told him they were going to detain the bag for examination by a narcotics detection dog. The dog made a positive sniff, leading the officers to obtain the search warrant authorizing them to open the bag." (App. 11)

The Eighth Circuit's holding--that presenting the evidence to the magistrate exonerates the prior illegal activity--is

inconsistent not only with this Court's opinion in Murray, but also with this Court's holding in Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416 (1975), that where the government unlawfully obtains evidence through an unconstitutional seizure, in order to use evidence ultimately discovered, the prosecution must demonstrate a removal or dissipation of the taint.

The Eighth Circuit--in the present Opinion and in United States v. White, 890 F.2d 1413 (8 Cir. 1989)--directly conflicts with the Tenth Circuit. United States v. Scales, 903 F.2d 765 (10 Cir. 1990). In Scales, the Tenth Circuit held that the rationale of Leon is inapplicable to situations where the agents unlawfully seize a citizen and his luggage and then obtain a warrant,

because, as distinct from Leon, in this type of situation, where the unlawful police activity occurs prior to obtaining the warrant, application of the exclusionary rule would have a deterrent effect on unlawful police activity. The Scales Court held that the specific holding of Leon does not apply to the facts in the Scales case, nor is Leon's underlying rationale presented:

> "WHEN THE DEA AGENTS ... [UNCONSTITUTIONALLY SEIZED THE SUITCASE] THEY WERE NOT ACTING PURSUANT TO A WARRANT SUBSEQUENTLY DEEMED INVALID. THE 'ILLEGALITY' WHICH ARGUABLY EXISTED HERE WAS NOT A FUNCTION OF THE AGENTS' GOOD FAITH RELIANCE ON A PRESUMPTIVELY VALID WARRANT. MOREOVER, THE SEARCH OF THE SUITCASE AFTER THE SEARCH WARRANT WAS ISSUED DOES NOT PREVENT US FROM EVALUATING THE AGENTS' BEHAVIOR PRIOR TO

THAT TIME." 903 F.2d at 768.[4] (Emphasis added.)

The rationale of the court in Scales is eminently correct. The holding in Leon is founded upon the proposition that whether the exclusionary rule should apply to a Fourth Amendment violation is dependent upon whether application of the rule would have a deterrent effect on illegal police action. In Leon, this Court held that where the police act in good faith in searching and seizing evidence pursuant to authorization of a

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4. It is immaterial that in Scales the detention of the luggage was due to the lengthy period of time of its detention prior to the dog sniff. Here, the police activity was even more egregious than in Scales, because here, according to the holding of the District Court, the actual seizure of the defendant and his luggage was in violation of the Fourth Amendment, i.e., there was not even sufficient factual basis for the detention of the luggage as under United States v. Place, 462 U.S. 696, 77 L.Ed.2d 110 (1983).

warrant issued by a magistrate after the magistrate has determined there is probable cause, excluding such evidence would have no deterrent effect. The very opposite is true here. As the Court of Appeals for the Tenth Circuit held in Scales, there is a deterrent effect where the officers know that if they conduct an illegal search and then use evidence seized in that search to obtain a warrant, the fruits of their subsequent search cannot be used as evidence in court. This is the express rationale for this Court's opinion in Murray.

Finally, the rule announced by the Eighth Circuit in White and applied in the case at bar is counter-productive because it provides the police with an incentive to violate the Fourth Amendment; it tells them that they can

conduct unlawful searches and seizures and then sanitize ("launder") their activity by channeling through the magistrate the information they already have plus further information they obtained through their unlawful activity, and then say, "Based on Leon, I acted in good faith in conducting a further search pursuant to warrant." Upholding the position of the Eighth Circuit totally emasculates the Fourth Amendment and the exclusionary rule.

CONCLUSION

For the foregoing reasons, certiorari should be allowed.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

A P P E N D I X

APPENDIX A

App. 1

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-2189

United States of America,	*	
	*	
Appellee,	*	Appeal from the
	*	United States
v.	*	District Court
	*	for the
Stanley Carter Kiser,	*	Southern District of Iowa.
	*	
Appellant.	*	

Submitted: May 15, 1991

Filed: October 16, 1991

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Stanley Kiser appeals from his

conviction of engaging in a continuing criminal enterprise in violation of 21 U.S.C. Sec. 848(b) (1988); conspiring to knowingly and intentionally distribute cocaine in violation of 21 U.S.C. Secs. 841(a)(1) and 846 (1988); and nine counts of knowingly and intentionally possessing various amounts of cocaine with the intent to distribute them between July 4, 1982, and January 17, 1984, in violation of 21 U.S.C. Secs. 841(a)(1) and 841(b)(1)(B) (1988). He was acquitted of three possession counts. On appeal, Kiser argues the district court[1] erred in: (1) failing to suppress evidence obtained as the result of an illegal search and seizure; (2) denying a motion

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1. The Hon. Harold D. Vietor, Chief Judge, United States District Court for the Southern District of Iowa.

to suppress the testimony of a prosecution witness whom Kiser had identified during immunized testimony; (3) ruling that he had no standing to use the exclusionary rule with respect to cocaine seized from an employee's car; (4) denying his right to confrontation regarding certain stipulations; (5) failing to grant acquittal because the government had not proved that the counts charged in the indictment occurred in the Southern District of Iowa; and (6) failing to grant a mistrial after allegedly prejudicial evidence of weapons found in Kiser's home came into the case and after evidence not previously made known to Kiser came into the case. We affirm the judgment of the district court.

Kiser begins the factual statement in his brief by asserting that this is the most complex criminal case litigated in the Southern District of Iowa in the last decade, if not ever. Whether or not this is true, the evidence disclosed a substantial pattern of drug activity, a long chain of procedural rulings, and the entry of guilty pleas by some eight of the persons charged. Kiser evidently developed a source of cocaine in Miami, Florida, in late 1979 or early 1980, and became acquainted with the codefendant Donald Ahrens, who purchased cocaine from him and sold it in the Quad-Cities area of southeast Iowa and northwest Illinois. The court ordered the forfeiture of Kiser's real estate and sentenced him to 20 years on the continuing criminal enterprise count, 15

years on the conspiracy count, and ten years on the possession with intent to distribute counts, all to run concurrently. Insofar as further factual details are necessary to consider Kiser's arguments, we will supply them as we consider each of the issues.

I.

Kiser first argues that the district court erred in failing to suppress evidence seized by law enforcement officers on May 6, 1980, at O'Hare Airport in Chicago. The officers' discovery of cocaine in Kiser's luggage led to a charge under Illinois law for possession of a controlled substance. Kiser was convicted, but an Illinois Appellate Court reversed. People v. Kiser, 447 N.E.2d 858. The court held that the officers lacked a reasonable and

articulable suspicion to detain Kiser and his luggage, and thus violated his fourth amendment rights. Id. at 861. Therefore, the evidence they seized illegally should have been suppressed. Id.

After Kiser was indicted on federal charges, the federal government attorney notified him that he would seek to introduce this cocaine into evidence at his trial. Kiser filed a motion to suppress, which the district court denied, relying on United States v. Leon, 468 U.S. 897 (1984), and United States v. White, 890 F.2d 1413 (8th Cir. 1989), cert. denied, 111 S. Ct. 77 (1990).

The government argues that the officers who confronted Kiser at O'Hare Airport had a reasonable articulable suspicion to detain him and his

luggage. It is unnecessary to address this argument. The district court determined that the evidence seized from the luggage was admissible despite any fourth amendment violation due to the good faith exception announced in Leon and applied by this circuit in White.

In Leon, the Supreme Court held that the exclusionary rule should not apply to suppress evidence when an officer has acted with "objective good faith" in obtaining a search warrant ultimately determined to be invalid. 468 U.S. at 920.[2] The Court stated that "where the officer's conduct is objectively reasonable, 'excluding the evidence will

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2. Because Leon was decided after the Appellate Court of Illinois decided People v. Kiser, the Leon good faith exception was not available during the state proceedings.

not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that ... the officer is acting as a reasonable officer would and should act in similar circumstances....'" Id. at 919-20 (citation omitted).

We applied the Leon good faith exception to an airport seizure in White, where we held that the officers lacked a reasonable articulable suspicion to justify detaining White or his luggage and thus violated his fourth amendment rights. White, 890 F.2d at 1419. Nevertheless, the officers in White did not open and search the luggage until they obtained search warrants, and we held that the facts were "close enough to the line of validity to make the

officers' belief in the validity of the warrant objectively reasonable." Id.

White narrows the issues before us. The only question we must determine is whether the circumstances made the officers' actions objectively reasonable, which is the inquiry we conducted in White after determining that the seizure violated the fourth amendment. White, 890 F.2d at 1419. See also Leon, 468 U.S. at 919-24.

The district court concluded that the officers unlawfully seized both Kiser and his luggage, violating his fourth amendment rights, but that under Leon and White, the facts presented a close enough question on the validity of the search warrant that reliance on the warrant could be deemed objectively reasonable.

Kiser came from the Miami/Fort Lauderdale/West Palm Beach area, a major source for cocaine and marijuana. Walking through the airport, he looked over his shoulder, stopped at a drinking fountain twice but failed to get a drink, and looked up and down the concourse while doing so. Investigation at the Budget Rental Car counter revealed that Kiser had rented a car a week before on a similar trip and was evasive about where he lived and his travel plans. He told the rental car agent he was using a credit card belonging to his father, but later told one of the officers that it belonged to a cousin. Kiser was unable to produce an airplane ticket, but the flight agent confirmed that Kiser was travelling under a fictitious name. Another officer asked Kiser why he had

lied to the employee at the Budget counter about the credit card, and Kiser became nervous. It was shortly afterwards that the officers asked for Kiser's permission to open the bag, which he refused to give. The officers then told him they were going to detain the bag for examination by a narcotics detection dog. The dog made a positive sniff, leading the officers to obtain the search warrant authorizing them to open the bag.

We have no hesitation in concluding that, as in White, the circumstances gave the officers an objectively reasonable belief that they possessed a reasonable articulable suspicion that would make the search warrant valid. As Judge Arnold stated in White, the type of circumstances we cited above push this

case into the gray area created by Leon. White, 890 F.2d at 1419.

Kiser argues that this court must overrule White. He claims that the good faith exception of Leon cannot be applied to a situation where an unconstitutional detention and seizure occurred before officers obtained their search warrant. This panel is without authority to overrule the earlier panel's decision in White. Only the court sitting en banc has such authority. Erickson Transport Corp. v. I.C.C., 741 F.2d 1096, 1098 (8th Cir. 1984) (Ross J., concurring). Were we free to reject White, we would refuse to do so, as we find its reasoning persuasive. The district court did not err in admitting the evidence.

II.

Kiser contends that the district court erred in failing to grant his motion to suppress the testimony of Alex Marrero because it was obtained directly or indirectly as a result of an immunity agreement between Kiser and the United States. Following his release from custody after being arrested on federal charges, Kiser flew to Washington, D.C., in February 1988 to give information about police corruption in Dade County, Florida, to the Office of Professional Responsibility of the DEA. He claims the DEA used the information to set up a sting that led to the arrest of Marrero, a former Metro-Dade County police officer. The district court held that the government did not derive Marerro's testimony directly or indirectly from

anything Kiser said during his interview, which the DEA conducted under a grant of immunity. The district court found that the government secured the information from an independent source and clearly would have discovered the information even if the DEA had not debriefed Kiser in Washington. The district court therefore denied the motion to suppress Marrero's testimony.

In Kastigar v. United States, 406 U.S. 441 (1972), the Supreme Court held that where one gives compelled testimony under a grant of immunity, the prosecution has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Id. at 460; U.S. v. Harvey, 900 F.2d 1253, 1258 (8th Cir. 1990)

(following Kastigar's requirement that evidence must come from legitimate source wholly independent of testimony given under grant of immunity), cert. denied, 111 S. Ct. 754 (1991). In Nix v. Williams, 467 U.S. 431 (1984), the Court held that the exclusionary rule would not bar the introduction of evidence if the information "ultimately or inevitably would have been discovered by lawful means." Id. at 444. The district court based its holding on both theories.

The government introduced evidence that before Kiser's interview, an investigative file had outlined the connection between Kiser and Marrero. The government initiated no investigation based on Kiser's information, and following Kiser's interview, the investigation of Marrero continued. When

three confidential informants and a wire tap resulted in the indictment of Marrero, he pleaded guilty and agreed to cooperate. The government never used or referred to any of the information Kiser gave in his interview. One of the government agents testified that Marrero's name came up in the principal investigation of Kiser in September 1985. The government believed that one of Kiser's associates sent an $8,000 money order to Marrero in 1983, and when officers arrested Kiser in July 1987, they found Marrero's business card on his person.

We are satisfied that this is sufficient evidence to carry the prosecution's burden of establishing that it obtained information from and developed testimony of Alex Marrero

through legitimate sources independent of Kiser's testimony, and that it would have inevitably discovered this information by lawful means. The district court did not err in denying the motion to suppress Marrero's testimony.

III.

Kiser argues that the district court erred in denying his motion to suppress evidence obtained through an illegal search and seizure of Steven Kurland's car on January 30, 1985. Kurland was an employee of Kiser and was driving cocaine to deliver it to another one of Kiser's employees. A third Kiser employee had placed the cocaine into the car. A Florida Highway Patrol trooper stopped Kurland for going 63 miles per hour in a 55-mile zone. The government and Kiser stipulated that the trooper had no

probable cause to stop the vehicle and that there was no legal basis for the seizure of the cocaine. The district court, however, found that Kiser had no reasonable expectation of privacy in the automobile or its contents and no standing to object to the seizure.

Kiser bears the burden of proving he had a legitimate expectation of privacy that was violated by the challenged search and seizure. Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980); Rakas v. Illinois, 439 U.S. 128, 130 n.1 (1978). See also United States v. Fahnbulleh, 748 F.2d 473, 477 (8th Cir. 1984), cert. denied, 471 U.S. 1139 (1985). The Supreme Court has enunciated a two part test to determine whether a person has a legitimate expectation of privacy in the place searched or object

seized. Smith v. Maryland, 442 U.S. 735 (1979); California v. Ciraolo, 476 U.S. 207 (1986). See also United States v. Monie, 907 F.2d 793, 794 (8th Cir. 1990). A court must determine: (1) whether the petitioner has asserted a subjective expectation of privacy, and (2) whether the petitioner's subjective expectation is objectively reasonable. Smith, 442 U.S. at 740; Ciraolo, 476 U.S. at 211. The first part of the test is a question of fact that we review under a clearly erroneous standard, while the second part is a question of law, dictating de novo review. Monie, 907 F.2d at 794.

Kiser argues that he had a reasonable expectation of privacy in the contents of the automobile. Kiser boldly asserts that he:

> most certainly possessed a reasonable expectation of privacy that an automobile he directed an employee to load with three kilograms of cocaine secreted in the automobile, and directed another employee to drive this automobile and deliver its contents to a third employee in California would be free from the constitutionaly [sic] impermissable [sic] seizure by Trooper Stallworth.

Kiser cites the following facts to support his claim. The cocaine belonged to Kiser. One of Kiser's employees placed the cocaine into the car in such a way as to avoid detection by anyone. The car belonged to another Kiser employee, Kurland, who was to deliver the cocaine to a third employee. Kiser may have facilitated the transfer of title of the car to Kurland.

We are not convinced that Kiser, by his conduct, exhibited an actual, subjective, expectation of privacy, or

that he showed that he sought to preserve the cocaine as private. Smith, 442 U.S. at 740. Kiser did not personally load the cocaine into the trunk of the car, nor is there evidence that he wrapped up the cocaine. While the evidence indicates that his employees carried out these acts, legitimate privacy expectations of others may not be vicariously asserted. United States v. Salvucci, 448 U.S. 83, 86 (1980) (citing Alderman v. United States, 394 U.S. 165, 174 (1969)). The record fails to prove that Kiser exhibited a subjective expectation of privacy in the trunk of Kurland's car.

Further, even if Kiser had a subjective expectation of privacy, we refuse to hold that it was objectively reasonable. In United States v. Macklin,

902 F.2d 1320 (8th Cir. 1990), cert. denied, 111 S. Ct. 689 (1991), we stated: "In Rakas, the Supreme Court held that because fourth amendment rights are personal and cannot be vicariously asserted ... a person has no reasonable expectation of privacy in an automobile belonging to another." Id. at 1330 (citation omitted). In Fahnbulleh, we held that the defendants:

> fail[ed] to establish any basis for their asserted privacy expectation because they did not own nor have any possessory interest in the vehicle which was searched, were absent at the time of the search, ... did nothing to protect their asserted privacy interest, and failed to show that they were aware their cocaine would be in the trunk of the car driven by [another].

748 F.2d at 477 (citations omitted). See also Macklin, 902 F.2d at 1330 ("to have a legitimate expectation of privacy by

way of a possessory interest, defendant must have possession of the vehicle and the keys.").

Fahnbulleh controls. Kiser did not possess or have title to the car, and was not present when the trooper searched the trunk in January 1985. Kurland did testify that he made earlier trips for Kiser using the same car before it was titled in Kurland's name. Kurland stated that Kiser delivered the car and keys to his apartment before Kurland's first delivery trip a year earlier in January 1984, but Kurland did not know who actually owned the car. Kurland also testified, and other evidence verified, that Vicky Ahrens had title to the car immediately before Kurland obtained title. While Kurland's testimony indicates that Kiser may have had some

type of possessory interest or control over the car, it does not rise to a sufficient level to give Kiser an objective expectation of privacy in the vehicle. Under the Smith analysis, the district court did not err in determining that Kiser has no standing to challenge the illegal search of Kurland's vehicle.

Kiser, to support his claim that he has standing to challenge the search of Kurland's car, relies on United States v. Garcia, 897 F.2d 1413 (7th Cir. 1990), and United States v. Broadhurst, 805 F.2d 849 (9th Cir. 1986). These cases are both distinguishable and unpersuasive. The Garcia holding was based on the fact that the defendant rightfully possessed the searched vehicle. 897 F.2d at 1417-19. The Ninth Circuit in Broadhurst enunciated a joint venture/co-conspirator

exception to the standing rules announced by the Supreme Court. Broadhurst held that there was "a formalized, ongoing arrangement between all six defendants for the cultivation of marijuana in [a] greenhouse." 805 F.2d at 852. Even if this were such a case, we would decline to adopt this exception recognized by only the Ninth Circuit.

IV.

Kiser contends that he was denied his right of confrontation when his trial counsel stipulated to the authenticity of and foundation for business records over his objection. The district court found that Kiser's counsel, Mark Pennington, had the authority, within his professional judgment, to make the stipulations and waive requirements for

foundation, regardless of his client's disagreement.

Kiser relies on Don v. Nix, 886 F.2d 203 (8th Cir. 1989), in which we held that a defendant's right of confrontation is fundamental and cannot be waived over his objection. Id. at 207. While Kiser may have been deprived of this right, we hold, similarly to the panel in Don, that it was harmless error beyond a reasonable doubt. Id. at 208. The stipulations related to the foundation and authenticity of business records of institutions, including car rental companies, motels, Western Union, Merrill Lynch, VISA, Diners Club, American Express, and records of government officers regarding titles and bank records. Moreover, Pennington reviewed all the exhibits subject to the proposed

stipulation and then objected to certain exhibits and had corrections made to them. He determined that the subjects of the stipulations were foundation witnesses, and admitted that he had no good faith basis to doubt the authenticity of the records, or to conduct cross-examination. In fact, he did not believe it was in his client's best interest to force the government to call the foundation witnesses, and concluded that there should be a waiver of undisputed facts which "bore no basis for a defense."

We conclude that Kiser was not prejudiced by his counsel's stipulations regarding the foundation evidence: "It might well have been advantageous trial tactics not to dispute the indisputable." United States v. Martin,

489 F.2d 674, 678 (9th Cir. 1973), cert. denied, 417 U.S. 948 (1974).

V.

Kiser contends that the district court erred in failing to grant his motion for judgment of acquittal because the government failed to prove that the counts charged in the indictment occurred in the Southern District of Iowa.

The government bears the burden of proving venue by a preponderance of the evidence, United States v. Delgado, 914 F.2d 1062, 1064 (8th Cir. 1990), United States v. Netz, 758 F.2d 1308, 1312 (8th Cir. 1985) (per curiam), and may establish it by either direct or circumstantial evidence. Netz, 758 F.2d at 1312. Proper venue lies in the district where the alleged offense was committed. Fed. R. Crim. P. 18. If the

offense was begun in one district and completed in another, or committed in multiple districts, the government may try the case in any district where the offense was "begun, continued, or completed." 18 U.S.C. Sec. 3237 (1988). This circuit has recognized possession of drugs with intent to distribute to be a continuing crime, see Delgado, 914 F.2d at 1065-66. The defendant does not have to actually possess the contraband; constructive possession is sufficient. United States v. Salinas-Salinas, 555 F.2d 470, 473 (5th Cir. 1977). A person is in constructive possession if he has "knowledge of presence plus control" over the item or items. United States v. Wajda, 810 F.2d 754, 761 (8th Cir.), cert. denied, 481 U.S. 1040 (1987). See

also Salinas-Salinas, 555 F.2d at 473 ("Constructive possession may be shown by ownership, dominion or control over the contraband itself....").

The record is replete with instances in which Kiser specifically engaged in the possession and distribution of cocaine in the Southern District of Iowa, either personally, or through his employees. For example, the evidence shows that all the cocaine Kiser distributed came from his established source in Miami, and that either Kiser or his employees would transport shipments into Iowa, among other states. Ricky Wilson testified that he and Kiser were bringing cocaine to Iowa from Miami when they were intercepted by law enforcement officials at O'Hare Airport in Chicago. Various witnesses testified that they

made trips from Miami, under Kiser's direction, to deliver cocaine to various associates of Kiser in Davenport, Iowa. Michael Harrison testified that, during his participation in the conspiracy, Kiser and two of his associates brought cocaine both to his trailer and residence for eventual distribution in the Davenport, Iowa, region. Jeff Jacobs testified that Kiser selected his drug couriers and determined what their travel arrangements and payments would be for trips made from Miami to Davenport. Gordon Coon testified that, while he was in Vail, Colorado, Kiser gave him a pound of cocaine to take to Davenport to sell; that Coon did so, and gave Kiser the proceeds of the sales when Kiser returned to Davenport. Alex Marrero testified that Kiser had said he did most of his

business in Iowa because that was where he "made most of his money." This brief catalog of evidence merely highlights a record filled with ample evidence to establish that events for which Kiser was indicted began, continued, or were completed in the Southern District of Iowa. The district court did not err in denying Kiser's motion for judgment of acquittal based on improper venue.

VI.

Kiser argues that the district court should have declared a mistrial after the jury heard evidence that weapons were found at Kiser's Colorado home. The district court had ordered the government not to introduce evidence of guns U.S. Marshals discovered while seizing Kiser's property. The government, however, played a videotape on which it had failed

to blank out an audio portion containing the statement, "In the bedroom we found numerous weapons." Kiser moved for a mistrial, which the district court denied because the mention of weapons was not so prejudicial as to deny Kiser a fair trial. We reverse such rulings only if we determine that the court abused its discretion. United States v. O'Connell, 841 F.2d 1408, 1427 (8th Cir. 1988), cert. denied, 487 U.S. 1210 (1988); 488 U.S. 1011 (1989). A witness for the prosecution had discussed Kiser's possession and use of weapons without objection. Thus, the later reference to weapons, inadvertently introduced to the jury, was not so prejudicial as to deny Kiser his right to a fair trial. The district court did not abuse its

discretion in denying Kiser's motion for a mistrial.

VII.

Finally, Kiser asserts that the district court erred in failing to grant his motion for a mistrial made after the government introduced evidence that had not been made known to him in a bill of particulars. The evidence related to two occasions of Kiser's involvement with the social use of cocaine. The district court found that these incidents were not in the nature of an overt act furthering the conspiracy, and that Kiser had adequate time to prepare to meet the evidence in question. We cannot conclude that the district court abused its discretion in refusing to grant Kiser's motion for a mistrial, nor do we see any demonstration of prejudice.

We affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.